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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-615

CONSUMER ENTERPRISES, INC.,
Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, National Football League Properties, Inc. ("NFLP"), respectfully prays that the Petition of Consumer Enterprises, Inc. ("Consumer") for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District, Second Division, be denied.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review an interlocutory judgment of an intermediate State Appellate Court, which merely held that the Trial Court did not abuse its discretion in issuing a *preliminary injunction*, pending trial, against the continuation of acts of Petitioner admitted on the pleadings to constitute trademark infringement, unfair competition, and deceptive trade practices?

2. Even assuming this Court has jurisdiction to review this case at its present *interlocutory* stage (which it clearly does not), should it do so in view of the facts that:

a. it recently refused to accept a Petition to review a decision of the United States Court of Appeals for the Fifth Circuit* wherein, after a full trial on the merits, the defendant was *permanently enjoined* from doing the same things the Petitioner was *preliminarily enjoined* from doing in the instant case; and

b. in the case decided by the Fifth Circuit*, the defendant raised precisely the same arguments in its defense and in its Petition as are advanced by the instant Petitioner, said arguments being found insufficient to constitute a defense and unworthy, as phrased in terms of the Questions Presented therein, for further review by this Court?

STATEMENT OF THE CASE

Petitioner's Statement of the Case is noteworthy in the respect that it admits: (1) that Petitioner has *copied* the names and designs licensed by the Respondent for use on merchandise, to signify the sponsorship and approval of such merchandise by the National Football League ("NFL") and its Member Clubs; and (2) has affixed such names and designs to cloth emblems, which Petitioner sells for application to the same type of merchandise licensed by Respondents. (Pet. 8)** However, Petitioner's Statement is misleading in the respects that it contains allegations not supported by the record and does not adequately explain the present interlocutory stage of the proceedings in question. A brief further explanation is therefore in order.

A Verified Complaint in this matter was filed by Respondent, NFLP, accompanied by a Motion for Preliminary Injunction.

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* *Boston Professional Hockey Association, Inc. et al.* v. *Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975), *cert. den.* Oct. 6, 1975 (Docket No. 75-156).

** References to Consumer's Petition will be denoted by "Pet.", followed by a numeral corresponding to the specific page of the Petition to which the reference relates.

Petitioner elected not to file an answer to the Complaint prior to the hearing on Respondent's Motion. The law of Illinois relating to the procedure and standards to be utilized by the Trial Court in such circumstances is succinctly set forth in the case of *H. K. H. Development Corp.* v. *Metropolitan Sanitary Dist.*, 47 Ill.App.2d 46, 196 N.E.2d 494 (1st Dist. 1964), as follows:

> It is the law in this State that on a motion for a temporary injunction, where the defendant has not answered the complaint and where the issues have not been joined, the court should not receive or consider evidence or affidavits.
>
> * * * * *
>
> *The motion for the temporary injunction had to be determined solely upon the verified complaint* and the verified supplement to the complaint. *Sunbeam Corp* v. *Richard's Appliances, Inc., supra; Lee* v. *Morris*, 326 Ill.App. 555, 62 N.E.2d 573; *Moss* v. *Balch*, 320 Ill.App. 135, 49 N.E.2d 801. Since the facts in the complaint and its supplement were uncontroverted, the court had to decide whether they and the applicable law were sufficient to sustain the plaintiff's motion. *The complaints did not have to make out a case which would entitle the plaintiff to the declaratory judgment prayed for, nor did they have to be of the character needed to obtain a final and permanent injunction.* It was only necessary that they raised a fair question as to the existence of the right claimed, led the court to believe that the plaintiff probably would be entitled to the relief prayed for if its proof should sustain its allegations, and make it appear advisable that the positions of the parties should stay as they were until the court had the opportunity to consider the case on its merits. (196 N.E.2d at 497; emphasis added)

Thus, the "record" before the Trial and Appellate Courts in this matter consisted solely of the Verified Complaint, the allegations of which were—and had to be—accepted as true for purposes of consideration of Respondent's Motion for Preliminary Injunction. Among such allegations were that: (1) valuable trademark rights had been acquired in the various

terms, symbols, emblems, designs and colors ("Trademarks") used by the Member Clubs of the NFL by means of the licensing thereof, through Respondent, for use on articles of merchandise, including clothing; (2) Petitioner's sale of patches bearing the Trademarks (which were admittedly copied from patches bearing the Trademarks appearing on merchandise licensed by Respondent) was likely to confuse purchasers of Petitioner's emblems and articles bearing Petitioner's emblems into believing that such patches and merchandise were sponsored, approved, certified, or licensed by the Member Clubs and/or Respondent and therefore constituted trademark infringement, unfair competition, and deceptive trade practices; and (3) Petitioner was passing off its patches bearing the Trademarks and merchandise bearing its patches as having been sponsored, approved, certified, or licensed by the Member Clubs and/or Respondent*.

It is hardly surprising, in view of the admission of the foregoing allegations by Petitioner for purposes of the hearing on Respondent's Motion for a Preliminary Injunction, that the Trial Court exercised its discretion in favor of granting the Motion. It is also clear that the Illinois Appellate Court, of whose decision further review is sought, had little choice but to affirm that exercise of discretion. It should be noted that, as expressly stated by the Illinois Appellate Court in its decision:

* The relevant portions of the Complaint containing the foregoing allegations are reproduced in the Appendix hereto. In view of the fact that these allegations were uncontroverted, it is interesting to note the following statements in Consumer's Petition:

> [T]he complaint did not charge petitioner with *passing off* or palming off the emblems as coming from respondent or member clubs of the National Football League. Such activities would, of course, constitute recognized acts of unfair competition, . . . (Pet. 7; emphasis added)
>
> It is most simply and most accurately stated that if petitioners did infringe any marks of respondent, then the decision of the Illinois Court cannot be attacked. (Pet. 10)

Having admitted, by failing to controvert, the allegations that it was guilty of trademark infringement and passing off, Petitioner now goes the further step of admitting that the interlocutory decision of which it seeks review by this Court was eminently proper.

> The sole question for review is whether the trial court *abused its discretion* in granting plaintiff a preliminary injunction. *Roth* v. *Daley*, 119 Ill.App.2d 462, 256 N.E.2d 166. (Pet. A14; emphasis added)

Moreover, the Supreme Court of Illinois followed the sound course of refusing the grant of leave to appeal to it the decision and order of the Appellate Court at this interlocutory stage of the litigation.*

ARGUMENT

I. This Court Lacks Jurisdiction to Review the Judgment Affirming the Award of Preliminary Injunctive Relief.

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U. S. C. § 1257(3). However, that provision grants to this Court jurisdiction to review, by writ of certiorari, only *final* judgments or decrees rendered by the highest Court of a state in which a decision could be had. Quite obviously, the judgment appealed from *is not final*. It merely affirmed the award of a *preliminary injunction* on the basis, as indicated above, that the Trial Court did not clearly abuse its discretion in awarding same.

This standard of review, of course, differs markedly from that applicable to final judgments and decrees. An applicant for preliminary relief need only raise a fair question of the existence of the right he claims and a *prima facie* case for final relief which would lead a Trial Court, in its discretion, to find a probability for ultimate success on the merits. *Capitol Records, Inc.* v. *Vee Jay Records, Inc.*, 47 Ill.App.2d 468, 197 N.E.2d 503 (1st Dist. 1964); *Gifford* v. *Rich*, 58 Ill. App.2d 405, 208 N.E.2d 47 (1st Dist. 1965). In the very

* The Illinois Supreme Court was, of course, guided by its Rule 318(b), Ill. Rev. Stat. 1973, Ch. 110A, § 318(b), which provides in relevant part:

> The review of cases at an interlocutory stage is not favored . . .

decision of the Illinois Appellate Court of which further review is sought, the Court stated:

> Upon our review of the *pleadings* in this case, and the exhibits attached thereto, we must conclude that a likelihood of confusion as to the source of defendant's emblems exists.
>
> For the foregoing reasons, plaintiff has shown a *probability of ultimate relief* from trademark infringement, unfair competition and deceptive practices. In view of this conclusion *we need not consider plaintiff's additional alleged causes of action.* (Pet. A19; emphasis added)*

Thus, the Petition fails to satisfy a critical prerequisite for review by this Court—that of being based on a final judgment. This Court has held, on many occasions, that this prerequisite is important to good judicial administration and cannot be ignored. For example, in *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U.S. 178 (1952), it was stated:

> From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case.
>
> * * * * *
>
> The provision of § 1257 that only "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ." has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat. 85, § 25.
>
> > "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124.

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* The additional causes of action not even considered by the Illinois Appellate Court at this preliminary stage were for: (1) injury to business reputation and dilution of trademark; (2) misappropriation of a property right; (3) misappropriation of the right of publicity; and (4) injury to Respondent's business relationships with its licensees.

> The distinction between a preliminary or temporary injunction and a final or permanent injuction was elementary in the law of equity. The classical concept was at one recognized and applied in *Gibbons* v. *Ogden, supra.* There is no room here for interpretation. The rule remains unchanged. (334 U.S. at 180)

There is no proper jurisdictional basis for the Petition before this Court, and the Petition should be denied.

II. Even if the Petition Had a Proper Jurisdictional Basis, It Should Not Be Granted.

At page 6 of the Petition appears a section entitled "Related Petition For Writ of Certiorari". The reference is to the case of *Boston Professional Hockey Association, Inc. et al.* v. *Dallas Cap & Emblem Mfg., Inc.* in which the decision of the United States Court of Appeals for the Fifth Circuit is reported at 510 F.2d 1004. Respondent agrees with Petitioner's statement that "the same essential questions are involved in such related petition". (Pet. 6) Of course, those questions were put to rest in the decision of the Fifth Circuit, which permanently enjoined a "patch pirate", like the Petitioner, from continuing its infringing activities after a full trial on the merits.

Perhaps Petitioner was unaware when it filed its Petition that on October 6, 1975 this Court had already denied a Petition for a Writ of Certiorari to the Fifth Circuit in the *Dallas Cap* case (Docket No. 75-156). Thus, even after having been the subject of a full trial on the merits, the "same essential questions" as presented in the instant Petition were deemed unworthy of review by this Court. They are now settled and are, in any event, not worthy of or subject to review in the context of an interlocutory decree.

CONCLUSION.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Selected and pertinent allegations from the Verified Complaint of Respondent, which were admitted for purposes of the Respondent's Motion for Preliminary Injunction:

> [Respondent NFLP] has entered into numerous agreements and arrangements with manufacturers and distributors of articles of merchandise, by which it has licensed such manufacturers and distributors to use the Member Clubs' [of the NFL] Trademarks [the terms, symbols, emblems, designs and colors adopted by the Member Clubs] in the advertising and sale of licensed and approved goods, the quality of which is supervised and controlled by NFL Properties . . . Lion Brothers Company, Inc. . . . is licensed to produce Patches displaying the Trademarks and to sell them to, but only to, manufacturers and distributors licensed by NFL Properties for the items mentioned above [articles of clothing, etc.] for use thereon. (Verified Complaint, ¶ 8)
>
> * * * * *
>
> Purchasers of articles of merchandise licensed by NFL Properties and bearing Patches displaying the Trademarks of the Member Clubs, have come to associate these Member Clubs with such articles of merchandise and to attribute sponsorship of these articles to the respective Member Clubs. (Verified Complaint, ¶ 11).
>
> * * * * *
>
> Substantial sales in Illinois and in interstate commerce of the Consumer [Petitioner's] patches bearing the Trademarks have been and are being presently made by Consumer. Such sales are likely to cause confusion or mistake or to deceive purchasers of such patches and/or of merchandise bearing such patches as to the sponsorship thereof by the respective Member Clubs, and constitute infringement of the Member Clubs' Trademarks . . . (Verified Complaint, ¶ 19).
>
> * * * * *

Consumer has used the Trademarks in Illinois in the manner set forth hereinabove to pass off its patches and merchandise bearing its patches (and/or has provided the means for and permitted and induced the passing off of merchandise bearing its patches) as having been sponsored by, approved of, certified by, or licensed by the Member Clubs and/or NFL Properties and so as to be likely to cause confusion or misunderstanding on the part of consumers in Illinois as to an affiliation, connection, association, certification, or approval of the Consumer patches by the Member Clubs and/or NFL Properties . . . (Verified Complaint, ¶ 26).